SUPREME COURT, U. S.
APR 25 1967
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1320

UNITED FRUIT COMPANY,
Petitioner,

—against—

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United Fruit Company (*"United"*), defendant below, prays for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered herein January 27 1967. Respondent International Railways of Central America (*"Railways"*) was the plaintiff below. Railways has petitioned in No. 1217 for issuance of a writ of certiorari with respect to the same judgment, and this petition of United Fruit Company is by way of cross-petition, the writ prayed to issue only in the event this Court should grant the petition in No. 1217 at this Term.

In the District Court both sides moved for partial summary judgment. The motion by United raised two defenses to Railways' action:

(a) the rule (in the nature of *res judicata*) against splitting of causes of action,

(b) the Federal statute of limitations with respect to matters occurring more than four years before the filing of the complaint.

The cross-motion by Railways was based on the claim:

> (c) that most of the basic facts had been found in its favor in the prior state court litigation and that United was estopped from denying any of those facts.

The District Court found in favor of United on all three items and granted partial summary judgment in United's favor on (a) and (b), and denied Railways' cross-motion on item (c).

The Court of Appeals affirmed the decision of the District Court on items (b) and (c), and held as to (a) that the District Court had erred in upholding the splitting defense as to years after 1960 and that the issue as to earlier years need not be decided in view of the affirmance on issue (b).

Railways, as petitioner in No. 1217, has limited the review sought by it to questions (b) and (c).

The review sought by this cross-petition seeks to bring question (a) into any review which this Court may undertake by virtue of the petition in No. 1217 because (i) the questions are necessarily interrelated in the record (ii) fairness is served by considering the whole case and the claims of both parties as to errors below and (iii) proper application of the rule against splitting of causes of action is a question meriting review under Rule 19 of this Court in addition to being a further support for the judgment of the Court of Appeals.

The defenses raised in (a) and (b) are partly overlapping in that they would dispose of some of the same claims made by Railways. To the extent defense (a) overlaps (b) it can and will be raised in No. 1217 as an alternative ground for sustaining the judgment of the Court of Appeals if this Court should grant the writ in No. 1217. Since defense (a) covers some subject matter not covered by (b), this petition has been filed in the belief that the

Court should resolve all of the issues in controversy if it decides to grant the petition in No. 1217.

Opinions Below

The opinion of the Court of Appeals, not yet officially reported, is attached as Appendix A to the petition in No. 1217. The opinion of the District Court, reported at 254 F. Supp. 233, is set forth in volume I, pp. 5a-21a, of Railways' appendix to its brief in the Court of Appeals filed with this Court in No. 1217.

Jurisdiction

The judgment of the Court of Appeals affirming in part and reversing in part the District Court was entered January 27 1967. Jurisdiction of this Court is invoked under 28 United States Code § 1254.

Question Presented

Where plaintiff's representatives (minority stockholders enforcing the rights of plaintiff corporation in a derivative stockholders' suit) had successfully prosecuted in the New York state courts during 1949-61 claims against defendant (petitioner herein) predicated upon theories of breach of fiduciary duties by defendant with respect to plaintiff corporation, and had recovered in the state court action a judgment exceeding $9,000,000 together with additional amounts to be paid *in futuro* under decree of the state court, and where the state court record and decision were permeated with evidence of conduct then regarded by plaintiff's representatives as violations of the United States antitrust laws on the part of defendant, known to and recognized by plaintiff's said representatives, and by all the stockholders as a class at the t ne of the state court action—

Does proper application of the rule against splitting claims (*res judicata*) permit plaintiff to bring into Fed-

eral court the same alleged antitrust violations and seek additional damages for injury to plaintiff's business already the subject of compensation by the state court judgment, on the basis of facts substantially identical to those disclosed and ventilated in the state court action?

Pertinent Statutes

The statutes pertinent to the antitrust claims asserted by plaintiff Railways, respondent herein and petitioner in No. 1217, are Sherman Act §§ 1 and 2 (15 USC §§ 1 and 2) and Clayton Act §§ 4 and 7 (15 USC §§ 15 and 18) which are reproduced in Appendix C to the petition in No. 1217.

Concise Statement of the Case

This suit claims treble damages under the antitrust laws (15 USC §§ 15, 22 and 26). The prior suit which, under the rule against splitting of claims, bars prosecution of the claims here is *Ripley* v. *International Railways of Central America and United Fruit Company,* reported at 8 AD 2d 310, aff'd 8 NY2d 430. That was a minority stockholders' action commenced in the Supreme Court New York County, February 14 1949 on behalf of Railways by 27 stockholders alleging domination and control of Railways by United, which at that time owned some 42% of the stock of Railways. The *Ripley* complaint alleged abuse by United of its resultant fiduciary obligations through under-payment of freight rates and in other ways summarized in the moving affidavit of Porter R. Chandler (par. 7; I-29a-30a).[1]

[1]References such as above are to the Roman numbered volumes, and the pages thereof, of Plaintiff-Petitioner's Appendix in the Court of Appeals filed with this Court in No. 1217 at this Term.

Four of the six attorneys who now represent Railways before this Court appeared and participated actively for Railways' stockholders throughout the *Ripley* case, which resulted in a judgment for the benefit of Railways of $4,531,055.38 as of January 2 1958, which, together with interest and future payments provided for by the judgment, caused United to pay to Railways $9,139,596.42 on March 1 1961. The state court judgment also directed a revised scale of payments to be made *in futuro* under the contracts between Railways and United; and these payments are still being made (I—30a). The immense scale of the *Ripley* trial was noted in the District Court's opinion (I—6a, 9a-10a) and is set forth in pars. 8 and 9 of the Chandler affidavit (I—30a-32a).

Identity of Subject-Matter as Between the Two Actions

In January 1962 United sold substantially all of its stock in Railways. In February 1965 Railways, under its new ownership and represented by four of the same attorneys who had previously represented the *Ripley* plaintiffs, brought the present action. The present amended complaint charges, in substance, that the same acts which were claimed as breaches of fiduciary duty in *Ripley* also constituted violations of the antitrust laws (except for the fifth claim, II—31-2, which is for breach of contract, not involved in the decisions below). It asks total treble damages of $507 million, less a credit for the $9 million-odd paid under the Ripley judgment.

The District Court found identity of subject-matter between the cases, in the following terms (I—11a):

> "We find that the facts presented to the New York court in the *Ripley* case were substantially the same as those presented by this litigation."

The Court of Appeals did not disagree, although pointing out that violations of the antitrust laws as such were not at issue in the state court (App. 19a-20a).[2]

While the thrust of the charge in *Ripley* was the injury caused to Railways by breach of United's fiduciary obligation as a controlling stockholder and the thrust here is the injury allegedly caused to Railways by United's violation of the antitrust laws, nevertheless the field of controversy is the same in both cases. The same acts of alleged wrongdoing, similar allegations of monopolistic practices, and the same items of damage appear in both. The inflation of the damage bill from the $9 million-odd awarded in *Ripley* to the $507,000,000 claimed here is accomplished by (i) trebling under the antitrust laws, (ii) adding back damage claims which had been litigated and rejected in *Ripley,* and (iii) the ingenious device of running the claims back to 1928 where the statute of limitations in *Ripley* had precluded recovery before 1943. All of the pre-1943 transactions which figure in the present complaint were, however, fully developed in *Ripley;* and both cases essentially involve the contractual and other relations between Railways and United in the import, export and internal commerce of Guatemala in the period of 1904 onwards.

As to the antitrust claims arising in the *Ripley* record, the District Court found that, notwithstanding the inability of the state court to consider such claims or violations, nevertheless the facts on which a Federal court might have made findings of this sort were before the state court (I—10a). As illustrations, the District Court then quoted specific references to monopolistic and anti-competitive practices from the *Ripley* pleadings and the Referee's Report (I—10a-11a). Indeed, Railways in its present peti-

[2]References such as above are to the pages of the appendix to the petition in No. 1217 at this Term.

tion before this Court in No. 1217 provides numerous instances of alleged antitrust violations found in the *Ripley* record (Petition in No. 1217 pp. 7-14).

To illustrate the pervasiveness of the present antitrust claims in the original *Ripley* state case, it may be enough for the purposes of this petition to quote the following findings from the Referee's decision in *Ripley:*

> "D109. The natural consequence of charging CAG [Compania Agricola de Guatemala, a wholly-owned subsidiary of defendant United] less than the public for the haulage of bananas from Western Guatemala, was to deter shipments of banana competitive to CAG." [III—141a]
>
> "B301. At all times since 1904 it has been the policy of United to suppress the development of competitive production and purchasing of bananas in Guatemala for export." [III—56a]
>
> "B305. United has sought and utilized its control and domination over IRCA [Railways] to suppress competition in the banana business in Guatemala." [III—56a]

Again in the sixth claim of the present amended complaint (II-32-3) the same acts which are charged in the first four claims to constitute a violation of the Sherman Act are stated to have constituted also a violation of Section 7 of the Clayton Act, with particular emphasis on the 1928 and 1936 acquisitions by United and its subsidiary Compania Agricola de Guatemala of stock in Railways.

Both of these stock acquisitions were set forth in the *Ripley* amended complaint (pars. 6, 10 and 11, I—147a-48a, 149a-50a), and were coupled with allegations that United used that stock ownership to control the activities of Railways and to suppress competition.

The evidence before the District Court is full of recognition by plaintiffs in the *Ripley* case, acting in the name

and right of the present plaintiff, that the antitrust claims now presented in this case for purposes of a further and multiple recovery were fully known to plaintiff's representatives in *Ripley* as early as March 1950. The moving affidavit of Porter R. Chandler (I—26a et seq. and the deposition of M. Victor Leventritt (D. App. 1a-48a),[3] one of appellant's principal lawyers both in *Ripley* and here, are illustrative. Mr. Leventritt, one of the *Ripley* attorneys who signs the petition in No. 1217, acknowledged that the *Ripley* trial developed material "which made it appear that the United Fruit Company had engaged in violations of antitrust laws of the United States. This was an inevitable by-product of the trial." Mr. Leventritt and his associates, then representing Railways' stockholders, concluded that the proper forum for any antitrust action against United was the Federal court rather than the state court, and gave consideration to advising the bringing of an antitrust suit at that time in the Federal courts (D. App. 26a-27a).

A summary of the evidence on this subject by the District Court may be found at I—16a, 254 F. Supp. at 239.

Reference may also be made to the institution of a separate action by one of the *Ripley* plaintiffs and another Railways' stockholder against United's subsidiary Compania Agricola in the United States District Court for the District of Delaware on March 30 1953 (D. App. 30a-34a). *Henis* v. *Compania Agricola* 116 F. Supp. 223, aff'd 210 F. 2d 950 (CA 3 1954); cf. Chandler affidavit (I—33a-34a). This included an attack on the 1936 acquisition by Agricola of the same 185,000 shares of Railways' stock which is now attacked as a violation of the Clayton Act in pars. 20 and 80 of the present amended complaint (II—9, 33).

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[3]Reference is to Defendant-Appellee's Appendix in the Court of Appeals filed with this Court in No. 1217 at this Term.

Reasons for Granting the Writ

In our brief in opposition to the Railways' petition in No. 1217, we argue, in summary, that the action of the Court of Appeals in affirming the granting of partial summary judgment on the basis of the statute of limitations was correct and presents no question appropriate for review by this Court, and that the petition in No. 1217 should accordingly be denied. In this present cross-petition, we urge that the Court of Appeals should also have affirmed the granting of partial summary judgment on the basis of the rule against splitting of claims, further narrowing the claims against United remaining for trial.

1. The close interrelationship of the statute of limitations and splitting defenses in the record and Court of Appeals opinion and fairness to the parties require the granting of this petition if the petition in No. 1217 is granted. The present situation is not one in which correct disposition of the case turns on some major issue of constitutional or statutory construction which can be extracted and considered in isolation from other points correctly decided below. Rather, this is an unusually complex interrelated dispute between two private parties turning on procedural questions, of which that raised by this petition is at the very least as significant as the points urged by Railways in No. 1217. In this posture, we believe that if the Court grants the petition in No. 1217, then this petition should also be granted and the case considered as a whole.

2. The decision of the Court of Appeals with respect to the rule against splitting claims or causes of action raises important questions of principle. It indicates a line of demarcation between the scope of state court decisions and the scope of decisions under the antitrust laws which

threatens an undesirable and unnecessary multiplication of litigation.

3. The well-established and desirable policy adverse to piecemeal litigation is exemplified by a long line of decisions in this Court establishing the general rule against splitting of claims. Such decisions include *U. S.* v. *California & Oregon Land Co.* 192 US 355 (1904); *Baltimore S.S. Co.* v. *Phillips* 274 US 316 (1927); *Grubb* v. *Public Utilities Commission of Ohio* 281 US 470 (1930). Accord: *Chicot Co. Dist.* v. *Baxter State Bank* 308 US 371 (1940). Mr. Justice Holmes thus articulated the rule, 192 US at 358:

> "It may be the law in Scotland that a judgment is not a bar to a second attempt to reach the same result by a different *medium concludendi* . . . But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim . . . and, *a fortiori,* he cannot divide the grounds of recovery."

In *Baltimore S.S. Co.,* this Court said, 274 US at 320:

> "The same general doctrine is stated in Stark v. Starr, 94 U. S. 477, 485, 24 L. ed 276, 278, that 'a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' "

The wisdom and policy of the rule are thrown into sharp relief by the record below. Not only are the damages claimed on the basis of the transactions previously tried in the state court, now enormous in amount, but the claims asserted on the basis of those transactions are made to reach back to 1904 and carry forward for a period of 58 years. The appellate record emanating from the trial in the *Ripley* case was of prodigious and practically unprecedented length. The burdensomeness for litigants of a departure now from the rule against splitting of claims, is manifest from this record.

4. The decision of the Court of Appeals on the splitting point appears to depart from the rationale of the courts of appeal in comparable cases in four other circuits, as respects antitrust causes of action. *Engelhardt* v. *Bell & Howell Co.* 327 F. 2d 30 (CA 8 1964); *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.* 295 F. 2d 362 (CA 5 1961); *Williamson* v. *Columbia Gas & Electric Corp.* 186 F. 2d 464 (CA 3 1950) cert. denied 341 US 921 (1951); *F. L. Mendez & Co.* v. *General Motors Corp.* 161 F. 2d 695 (CA 7 1947) cert. denied 332 US 810 (1947). In each of these cases Federal treble damage antitrust claims were held barred by an earlier judgment seeking, as here, damages for the same injury but alleging a different theory of recovery. Early in the history of the Sherman Act, the same principle was applied in the Second Circuit although no longer favored there. Compare *Straus* v. *American Publishers' Assn.* 201 Fed. 306 (CA 2 1912) with *Lyons* v. *Westinghouse Electric Corp.* 222 F. 2d 184 (CA 2 1955).

The characterization in *Lyons* of *Straus* as not a valid precedent and the reaffirmance of that view by the Court of Appeals in this case (App. 21a) creates a conflict of the decisions in the Second Circuit with the decisions in

the Third, Fifth, Seventh and Eighth Circuits regarding the applicability to antitrust claims of the general principle against splitting of claims.

Conclusion

For the reasons stated, if the petition in No. 1217 is granted, this petition should be granted also and the cases consolidated for argument.

Dated: New York, New York
April 24 1967

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